INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and Army Regulations Involved	2
Statement	2
Argument	5
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Blackmar v *Guerre, et al.*, No. 361, this term	7
Creary v. *Weeks*, 259 U. S. 336	5, 7
Decatur v. *Paulding*, 14 Pet. 497	5
Estep v. *United States*, 327 U. S. 114	9
French v. *Weeks*, 259 U. S. 326	7
Gusik v. *Schilder*, 340 U. S. 128	9, 10
Inland Steel Co. v. *National Labor Relations Board*, 105 F. 2d 246	14
Kristensen v. *McGrath*, 179 F. 2d 796, affirmed, 340 U. S. 162	10
Ludecke v. *Watkins*, 335 U. S. 160	9
Patterson v. *Lamb*, 329 U. S. 539	3, 7
Reaves v. *Ainsworth*, 219 U. S. 296	5, 7, 10
Reid v. *United States*, 161 Fed. 469, writ of error dismissed, 211 U. S. 529	5
Robertson v. *Chambers*, 341 U. S. 37	6, 11
Silberschein v. *United States*, 266 U. S. 221	14
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	8, 10
United States v. *Chemical Foundation*, 272 U. S. 1	14
United States ex rel. Trinler v. *Carusi*, 166 F. 2d 457, vacated, 168 F. 2d 1014	10
Statutes, Article of War, and regulations:	
Act of October 25, 1951, ch. 588, P. L. 220, 82d Cong., 1st Sess.	11
Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009):	
Section 10	5, 7, 8, 12, 16
Legislative Reorganization Act of 1946 (60 Stat. 812):	
Section 131	10, 11
Section 207 (5 U. S. C. 191a)	10, 11

Statutes, Article of War, and regulations—Continued — Page

Servicemen's Readjustment Act of 1944 (58 Stat. 284, as amended by the Acts of Aug. 8, 1946, 60 Stat. 932, and July 26, 1947, Sec. 205, 61 Stat. 501, 38 U. S. C. 693, *et seq.*):
- Section 300 — 4
- Section 301 — 4, 5, 6, 8, 9, 12, 15
- Section 302 — 9

New York Mental Hygiene Law, Section 74 — 4
108th Article of War (10 U. S. C. 1580) — 17
Army Regulations 615–366, dated 10/21/44 — 2–3, 17

Miscellaneous:
- 90 Cong. Rec. 3076–3077 — 9
- 90 Cong. Rec. 4538–4541 — 9
- Federal Rules of Civil Procedure, Rule 12 (b) — 12
- H. R. 1203, 79th Cong., 1st Sess — 8
- Manual for Courts-Martial, U. S. Army (1949), p. 199 — 6
- 40 Op. A. G. 504, 508 — 11
- 41 Op. A. G. No. 1, p. 2 — 11
- 41 Op. A. G. No. 8, p. 4 — 11
- Rules of the United States District Court for the District of Columbia, Rule 29 — 12
- S. 7, 79th Cong., 1st Sess — 8
- Senate Judiciary Committee Print, June 1945, Comment on Section 10 (e), Senate Document 248, 79th Cong., 2d Sess., p. 39 — 7
- S. Doc. 248, 79th Cong., 2d Sess.:
  - Pages 83–84 — 7
  - Pages 229–230 — 7, 8
  - Page 311 — 7
  - Page 413 — 8
  - Page 415 — 7
- S. Rep. 1400, 79th Cong., 2d Sess., p. 7 — 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 512

NICKULUS A. GENTILA, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, JEAN GENTILA, PETITIONER

v.

FRANK PACE, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia wrote no opinion (R. 24A). The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 27–30) is not yet reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 23, 1951 (R. 31). The

petition for a writ of certiorari was filed on January 4, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

In 1944 petitioner was discharged without honor from the Army of the United States for misconduct. He petitioned an Army Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 that he be given an honorable discharge in place of the discharge he had received. The Board declined to grant the relief requested. The question presented is whether the Administrative Procedure Act authorizes judicial review of the Discharge Review Board's decision.

STATUTES AND ARMY REGULATIONS INVOLVED

The pertinent provisions of the statutes and Army regulations involved are set forth in the Appendix, *infra,* pp. 15–17.

STATEMENT

Petitioner was inducted into the Army on May 7, 1942 (R. 2A). He absented himself without authority on September 7, 1943 for about a year and voluntarily returned to Army control on September 10, 1944 (R. 3A). The Army thereupon instituted proceedings to discharge him for misconduct under Army Regulations (A. R.

615–366 (*infra*, p. 17))[1] which permit the discharge without a trial of an absentee or deserter who is found physically unfit for service. Physical unfitness under this provision includes "those cases of mental deficiency and constitutional psychopathy that obviously cannot be adapted to military service," but a serviceman may not be discharged under this regulation if he does not "possess sufficient mentality to distinguish between right and wrong and is consequently incapable of forming the intent" to desert.

Petitioner's medical examination resulted in a diagnosis that he was a constitutional psychopath with a severe emotional instability, but that he was not psychotic, that he knew the difference between right and wrong, and that he was capable of forming an intent to desert (R. 11A–12A).

On November 29, 1944 petitioner was discharged without honor (R. 3A).[2] About 1½ years later, in April 1946, petitioner was adjudged mentally ill and a proper subject for treatment and custody in an institution pursuant

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[1] The authority to issue this regulation is based on the 108th Article of War (10 U. S. C. 1580); cf. *Patterson* v. *Lamb*, 329 U. S. 539, 542.

[2] The complaint (Paragraph 8) alleges that petitioner was given a discharge under dishonorable conditions (R. 3A). A. R. 615–366 (Par. 10), *infra*, p. 17, provides, however, that (blue) W. D. AGO Form 56 will be used for all discharges under the provisions of this section. This is a discharge without honor but not a dishonorable discharge.

to Section 74 of the New York Mental Hygiene Law (cf. R. 3A).

In 1947 petitioner filed an application with the Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 (58 Stat. 286, 38 U. S. C. 693h, *infra,* pp. 15–16), requesting that he be issued an honorable discharge restoring him to veteran's benefits (cf. Servicemen's Readjustment Act of 1944, Section 300, 38 U. S. C. 693g). This application was denied. (R. 3A–4A).

In the following year, petitioner submitted a petition for rehearing which was granted; but after the new hearing had been held the application was again denied. An appeal to the Secretary of the Army was also denied (R. 4A).

In September 1949 the deposition of the Army doctor who had examined him at the time of his discharge was taken in which the doctor "indicated a possibility of error in his former diagnosis" (R. 4A; cf. 14A). On the basis of this deposition petitioner sought a second rehearing which, however, was denied on November 8, 1949 (R. 4A).

Petitioner filed his "Amended Complaint for Mandatory Injunction" on January 11, 1950 (R. 2A). The motion of the Secretary of the Army to dismiss the complaint (R. 5A) was referred to the Veterans' Commissioner who filed a detailed report which petitioner has incorpo-

rated in the record in the court below and in this Court (R. 8A–24A; 32). The District Court dismissed the complaint without opinion (R. 24A); the Court of Appeals affirmed on the ground that the statute creating the Discharge Review Board precluded judicial review (R. 27–30).

ARGUMENT

The sole point raised in this petition is whether petitioner is entitled to a judicial review of the decision of the Discharge Review Board denying him an honorable discharge.[3] A Discharge Review Board established pursuant to Section 301 of the Servicemen's Readjustment Act of 1944 (*infra*, pp. 15–16) has authority to review the discharge of a serviceman (unless decreed by a general

[3] The complaint alleged two additional instances of agency action which petitioner sought to have reviewed; he evidently is no longer pressing them. They are the failure of respondent personally to review the action of the Discharge Review Board (par. 17, R. 4A), and the administrative discharge without honor itself (par. 19, R. 5A). These points are without merit. Section 301 of the Servicemen's Readjustment Act (*infra*, pp. 15–16) does not place a duty upon the Secretary of the Army to review the findings of the Discharge Review Board. His authority to do so is at best discretionary and, hence, his failure to act is not subject to judicial review. *Decatur* v. *Paulding*, 14 Pet. 497; Administrative Procedure Act, Section 10 (*infra*, pp. 16–17). The contention that administrative discharges from the Army constitute a denial of due process was rejected in *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *Creary* v. *Weeks*, 259 U. S. 336, 343–344; see also *Reid* v. *United States*, 161 Fed. 469 (S. D. N. Y.), writ of error dismissed, 211 U. S. 529.

court martial) on the basis of the available record of the service department and other evidence properly before it (cf. *Robertson* v. *Chambers,* 341 U. S. 37) and to issue a new discharge in accord with the facts presented. Section 301 provides that the findings of a Discharge Review Board shall be final, subject only to review by the Secretary of the service department involved. This finality provision, together with the nature, history, and background of the Review Board's work, show that judicial review is precluded.

Moreover, even if review were available, petitioner could not recover. He unquestionably absented himself from his post of duty in the Army without leave for more than a year (R. 3A). It is clear, therefore, that he was entitled to the administrative relief sought by him only if the facts presented to the Board showed that when he so absented himself in 1943 (i. e., 2½ years before he was committed as mentally ill), he did not possess sufficient mental capacity to distinguish between right and wrong and, consequently, was incapable of forming the intent to desert.[4] And there was substantial medical evidence before the Board that petitioner was not psychotic and that he knew the difference between right and wrong (R. 11A–12A, 27). It is plain, therefore, that the action of the Discharge Review Board in this case

[4] Protracted absence without leave, not satisfactorily explained, warrants the inference of an intent to desert. Manual for Courts-Martial, U. S. Army (1949), p. 199.

was not arbitrary. In the circumstances, the trial court was certainly without power to disturb the conclusions reached by that Board.

1. The court below properly held that the trial court had no jurisdiction to review the decision of the Discharge Review Board. It has been established in a long line of decisions that the courts will not review the action of military boards and tribunals with respect to the type of discharge issued to a member of the armed forces. *Reaves* v. *Ainsworth,* 219 U. S. 296, 306; *French* v. *Weeks,* 259 U. S. 326, 335–336; *Creary* v. *Weeks,* 259 U. S. 336, 344; cf. *Patterson* v. *Lamb,* 329 U. S. 539, 542. Petitioner apparently concedes that this was the law up to 1946, but claims that access to the courts has been opened to him by virtue of Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009, *infra,* pp. 16–17, hereinafter sometimes referred to as the Act). We submit that the Administrative Procedure Act does not have this effect.

As a general proposition, Section 10 of the Act did not make judicial review available where there had been none before. The "mischief" which this section was supposed to cure was the scope of judicial review, not its availability (Senate Judiciary Committee Print, June 1945, comment on Section 10 (e), Senate Document No. 248, 79th Cong., 2d Sess., p. 39; cf. pages 83–84, 229–30, 311, 415, to the effect the Act was not in-

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tended to interfere with the existing law granting or denying judicial review). See, generally, Brief for Respondents, *Blackmar* v. *Guerre, et al.*, No. 361, this term; at pp. 26–37.

Under Section 10 of the Administrative Procedure Act a person aggrieved by administrative action is entitled to judicial review, "except so far as statutes preclude" it. Section 301 of the Servicemen's Readjustment Act of 1944, *infra*, pp. 15–16, is a statute precluding judicial review within the meaning of Section 10. Section 301, which authorizes the establishment of Discharge Review Boards does not state in express terms that the decisions of such Boards shall be subject to judicial review. On the contrary, it states that the findings of those Boards shall be final and subject to review by the Secretary of the Army or the Navy as the case may be. Section 10 of the Administrative Procedure Act does not require that judicial review be *expressly* precluded.[5] Thus the question whether judicial review has been precluded is largely a matter of congressional intent, to be determined on the basis of the purposes of the legislation and the traditional

[5] The bill as originally introduced in Congress read "except so far as statutes *expressly* preclude judicial review" (S. 7. H. R. 1203, 79th Cong., 1st Sess.); the word *expressly* was eliminated in Committee. Moreover, the Attorney General's commentary to Congress on the Bill pointed out that this Court had repeatedly construed a statute, which did not preclude judicial review in express terms, as precluding it by implication. Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 229–230, 413.

availability *vel non* of judicial review in that particular legal sphere (cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 306; *Ludecke* v. *Watkins,* 335 U. S. 160, 164–165; *Estep* v. *United States,* 327 U. S. 114, 120–124; *Gusik* v. *Schilder,* 340 U. S. 128, 132).

The purpose of Section 301 of the Servicemen's Readjustment Act was to create an administrative machinery within the service departments whereby servicemen could have their discharges reviewed without the necessity of recourse to special acts of Congress (90 Cong. Rec. 4538). The pertinent congressional debates in the Senate and in the House (90 Cong. Rec. 3076–3077 and 4538–4541) do not indicate any legislative purpose radically to depart from the existing law, which denied judicial review of the discharges, and to subject the courts of the District of Columbia to a flood of litigation in that field.[6]

[6] We have been advised by the Department of the Army that from the time of its organization in 1944 until December 31, 1950, the Army Discharge Review Board alone has handled 34,535 cases. In order to determine the amount of potential litigation which would be created by Secs. 301 and 302 of the Servicemen's Readjustment Act of 1944 if they provided for judicial review, it would be necessary to add to these 34,535 cases those passed upon by the Navy, Coast Guard, and Air Force Discharge Review Boards and those decided by the Disability Review Boards. Virtually all litigation to review the Board's decisions would have to be brought in the United States District Court for the District of Columbia. The resulting relative increase of its workload may be measured by the fact that during the last few years an average of 5,500 civil cases has been filed with that court per year.

This interpretation of Section 301 is supported by the finality clause providing that the findings of the Discharge Boards of Review shall "be final subject only to review by the Secretary of the Army * * *." It is true that a finality clause of this type does not by itself preclude the judicial review of such administrative decisions as traditionally have been reviewable.[7] On the other hand, in a field, as here, in which judicial review traditionally has been absent and where it would increase the work load of the courts by a substantial percentage the insertion of this clause constitutes an additional circumstance manifesting a congressional intent that disputes concerning discharges are to reach their terminal point within the service department and are not to be carried over into the courts. Cf. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 305; *Reaves* v. *Ainsworth,* 219 U. S. 296, 306.

Moreover, contemporaneous evidence indicates that Congress itself did not believe that the Administrative Procedure Act had provided for judicial review of the decisions of the Discharge Review Boards. This appears from the insertion of Sections 131 and 207 into the Legislative Reorganization Act of 1946 (60 Stat. 812, 831, 837) which was passed less than 2 months after the approval of the Administrative Procedure Act.

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[7] *Gusik* v. *Schilder,* 340 U. S. 128, 132–133; *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), affirmed, 340 U. S. 162; *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457, vacated, 168 F. 2d 1014 (C. A. 3).

These two sections, the purpose of which is to save congressional time,[8] prohibit the reception and introduction in either House of private bills authorizing or directing the correction of a military or naval record (Section 131), and authorize the establishment of civilian boards within the several service departments for the correction of such records (Sec. 207, 5 U. S. C. 191a).[9] If it had been the understanding of Congress that the decisions of the Discharge Review Boards would be reviewed by the courts there would have been little ground to fear the introduction of an unusually large number of private bills, and even less reason to establish administrative boards with the power to grant relief despite the decisions of the Discharge Review Boards (41 Op. A. G. No. 1).[10]

2. Assuming, *arguendo,* that the decisions of the Discharge Review Boards are subject to judi-

[8] S. Rep. 1400, 79th Cong., 2d sess., p. 7.

[9] Section 207 was not included in the bill when it passed the Senate on June 10, 1946, one day prior to the approval of the Administrative Procedure Act. It was inserted subsequently by the House Committee. That section was amended by the Act of October 25, 1951, ch. 588, Public Law 220, 82d Cong., 1st Sess. in a way not relevant to the instant litigation.

[10] It may be that the Army Board on the Correction of Military Records to which have passed the prerogative powers of Congress to dispense clemency (40 Op. A. G. 504, 508; 41 Op. A. G. No. 1, p. 2; 41 Op. A. G. No. 8, p. 4) does have power to grant petitioner a type of relief which the Discharge Review Board could not give since the scope of ~~its~~ authority of such ~~Army~~ Board is limited to getting "at the truth of the matter" (cf. *Robertson* v. *Chambers*, 341 U. S. 37, 39).

cial review, we submit that this case does not warrant review by this Court, since the decision of the court below is clearly correct.[11]

Although this case was decided on a motion to dismiss, the record as designated by petitioner (R. 32) contains the report of a Commissioner appointed pursuant to Rule 29 of the Rules of the United States District Court for the District of Columbia (R. 8A–24A). This report is based not merely on the pleadings, but also on interrogatories, the answers thereto, exhibits, and the deposition of Dr. Wiemer, the physician who had examined petitioner prior to his discharge from the Army (R. 9A). Since petitioner chose to include in this record matters which were outside the pleadings, this Court may find it proper to consider them in connection with this petition, particularly since the trial court might properly have considered them had it treated the motion to dismiss as a motion for a summary judgment. See Rule 12 (b), Federal Rules of Civil Procedure.

The Commissioner's report discloses that there was substantial evidence before the Board to support the denial of the relief sought by peti-

[11] None of the cases cited by petitioner as being in conflict with the decision of the court below has any bearing on the narrow question presented in this case, *viz.*, whether Section 301 of the Servicemen's Readjustment Act of 1944 is a statute precluding review within the meaning of Section 10 of the Administrative Procedure Act.

tioner. Petitioner was inducted into the Army in May 1942, and his efficiency rating was excellent or very good until he absented himself without leave in September 1943 (R. 8A). When he surrendered a year later, the medical examination by Doctor Wiemer disclosed that petitioner was not then a psychotic, that he knew the difference between right and wrong, and that he was capable of forming the intent to desert (R. 11A–12A).[12] Petitioner was committed as being mentally ill in April 1946, i. e., 2½ years after he absented himself from the Army. In view of the medical report and the slowly progressing nature of petitioner's illness (Pet. 26) there was, we submit, ample evidence before the Army Discharge Review Board to support a finding that petitioner was capable of forming an intent to desert at the time he absented himself from the Army sometime in September 1943.

Looking to the pleadings alone, the bare allegations in the complaint that the action of defendant was arbitrary[13] and unjustified (pars. 16 and

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[12] The very qualified concession of Doctor Wiemer that he possibly might have made a mistake was not before the Discharge Review Board. (Complaint, par. 15; R. 4A.) The failure to grant a second rehearing on the basis of this self-contradictory deposition (R. 13A–14A) cannot be considered an abuse of discretion.

[13] The allegation contained in paragraph 10 of the complaint (R. 3A) that petitioner was suffering from a mental illness when he absented himself from the Army without leave, is insufficient to sustain his conclusion that he was incapable of having an intent to desert.

17, R. 4A) and that the Discharge Review Board was not properly authorized and constituted (par. 18, R. 5A) do not state a cause of action. A general allegation to the effect that a Government official acted arbitrarily and unjustly is a mere legal conclusion and is not admitted by a motion to dismiss. *Silberschein* v. *United States,* 266 U. S. 221, 225. And the bare assertion that a governmental board was not properly authorized and constituted is subject to the same objection in view of the presumption of regularity which attaches to governmental action until the contrary is shown. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; *Inland Steel Co.* v. *National Labor Relations Board,* 105 F. 2d 246, 251–252 (C. A. 7).[14]

CONCLUSION

The decision of the court below is correct and does not warrant review. There is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

HOLMES BALDRIDGE,
Assistant Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

FEBRUARY 1952.

[14] The detailed report of the Commissioner (R. 8A–24A) does not contain any reference to these alleged irregularities. Petitioner apparently has not even tried to elaborate on these stock charges.

APPENDIX

1. Sec. 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, as amended by the Acts of August 8, 1946, 60 Stat. 932, and July 26, 1947, Sec. 205, 61 Stat. 501, 38 U. S. C. 693h provides as follows:

> The Secretary of the Army and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Department of the Army and Navy Department, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided,* That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200

of the Act of June 29, 1936 (Public Law Numbered 844, Seventy-fourth Congress). Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of the Army and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army or the Secretary of the Navy, respectively: *Provided,* That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act [June 22, 1944] whichever be the later: *And provided further,* That the authority conferred upon the Secretary of the Army and the Secretary of the Navy by this section shall vest in and be exercised by the Secretary of the Treasury, at such times as the Coast Guard is operating under the Treasury Department, with respect to the discharge or dismissal of former personnel of the Coast Guard, and that the findings of boards established pursuant to such authority shall be final subject only to review by the Secretary of the Treasury.

2. Sec. 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

3. Army Regulations 615–366 dated October 21, 1944, provided in pertinent part:

Par. 8. * * *

b. *Statute of limitations not applicable.*—The commanding general of the service command, or other officer exercising general or special court-martial jurisdiction, may order the discharge without trial, because of desertion and physical unfitness, after return to military control, of an absentee or a deserter who is found physically unfit for service, and whose trial is not barred by the 39th Article of War.

(1) The term "physical unfitness" as used in this paragraph will be construed to include only—

(a) * * *

(b) Those cases of mental deficiency and constitutional psychopathy that obviously cannot be adapted to military service.

(2) Discharge will not be ordered under the provisions of this section if—

(a) * * *

(b) The enlisted man does not possess sufficient mentality to distinguish between right and wrong and is consequently incapable of forming the intent which is an

essential element of the offense of desertion. See AR 615–300.

Par. 10.

Form of discharge certificate to be given.—Discharge from the Army of the United States (blue) (WD AGO Form 56) will be used for all discharges under the provisions of this section.

U. S. GOVERNMENT PRINTING OFFICE: 1933